SUPREME COURT, U. S.

FILED

FEB 3 1975

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-620

EDWARD S. IRONS,
Petitioner,

v.

COMMISSIONER OF PATENTS,
Respondent.

REPLY MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MARY HELEN SEARS
1801 K Street, N.W.
Washington, D.C. 20006
296-8855

Attorney for Petitioner

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

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1. Respondent's tardy memorandum in opposition[1] does not gainsay the importance of the questions pre-

[1] The petition was filed November 20, 1974. Respondent's brief was due, pursuant to the special treatment which Rule 24(1) affords the government, within fifty days plus the three days allowed for mail service—or by January 13, 1975 at the latest. With characteristic disregard for both tis opponent's rights and the Court's rules, respondent sought no extension of time but simply arrogated the privilege of filing a memorandum some eighteen (18) days later on January 31, 1975. The deliberate character of this transgression is manifest from respondent's effort at camouflage whereby in further derogation of the Court's rules, respondent's brief is dated simply "January, 1975" (R. Br. 4) rather than January *31*, 1975 as it should have been.

[Footnote continued on page 2]

sented or deny that they are properly raised in this case, but opposes the grant of certiorari as premature (point 1, R. Br. 2) and argues that the district court in any event had discretion to depart from accepted standards of judicial conduct and to deprive petitioner of a fair hearing (points 2 and 3, R. Br. 2-4).

(a) The suggestion of prematurity is contrary to the record. The Court of Appeals has *twice*, without qualification, denied the relief now sought.[2] That Court has nonetheless recognized that petitioner should not be required to deal **de novo** on appeal with information and arguments of which he was not timely notified and had no opportunity to meet below, *at least* until after all attempts to obtain a fair hearing have been exhausted—and has accordingly *stayed* petitioner's obligation to file a brief on the merits on several occasions,[3] most recently until

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[1] [Continued]

In the circumstances, the Court would be more than justified in proceeding along lines analogous to the treatment afforded similarly remiss litigants in the lower federal courts, and dealing with the petition *independently of respondent's arguments* on the ground that respondent has forfeited the right to be heard by its own dilatory conduct.

[2] Specifically, through a two-judge panel on September 23, 1974, (Pet. 1a) and, *en banc*, on October 18, 1974 (Pet. 2a). In neither case did that court suggest that the denial was "without prejudice" or otherwise qualified so as to afford petitioner an opportunity of pressing for the same relief in a brief on the merits of the appeal.

[3] Petitioner's obligation to file a brief on the merits was held in abeyance during pendency of the motion for summary reversal denied September 23, 1974 (Pet. 1a) notwithstanding respondent's opposition based on the argument that "the motion for summary reversal and the merits raise interrelated issues which can best be disposed in a single proceeding. . . ." (Opposition to Appellant's motion for stay of proceedings" filed below in Appeal No. 74-1365 on June 7, 1974). Appellant was granted a further extension of time, again over respondent's opposition until "20 days from the date of this Court's ruling on appellant's [i.e., petitioner's] pending

"20 days from the date of disposition by the Supreme Court of the Petition for Certiorari pending in Supreme Court No. 74-620".[4]

The issues raised for review by this petition are now ripe for certiorari review on the same rationale which governs the ripeness for appellate review of collateral orders. The refusal of the district judge to recuse himself and vacate his tainted decision on the merits is an action which falls ". . . in that small class which finally determine claims of right separate from and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949).

Having been deprived by the district court's improper and irregular conduct of the opportunity to make an appropriate record on which to stand, peti-

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petition for rehearing *en banc*." Respondent's opposition served October 9, 1974 was again on the basis that "the issues raised. . . can be resolved most expeditiously in the context of an appeal on the merits." After the appellate court's denial of the petition for rehearing *en banc* (Pet. 2a) petitionr moved for an extension of time to November 22, 1974 expressly stating his intention to file this petition on or before that date. That motion, which respondent did *not* oppose, was granted as of October 15, 1974 over the handwritten initials of the chief judge of the District of Columbia Circuit. Upon the filing of the petition in this court, petitioner's further motion to extend the time until 20 days after this Court's action thereon was filed and granted on December 6, 1974—again without opposition from respondent.

In short, the prematurity argument is one on which respondent was uniformly unsuccessful, and which respondent ultimately abandoned, in the court below. The argument merits no greater success here.

[4] The quotation is from the December 6, 1974 order of the Court of Appeals.

tioner is disabled to obtain a fair hearing on the merits of the appeal from the district court's tainted order on the merits. Hence, review *now* is appropriate in the interests of justice, including judicial economy.

(b) Respondent's efforts to show that the district court had discretion to proceed as it did (R. Br. 2-4) are misdirected on this petition for certiorari and are not cognizable on the question of whether certiorari should be granted. Rather, they are a mere preview of what respondent will say if the case is accepted to be heard on the questions raised by the petition.

The attempted reliance upon the district judge's self-serving characterization of the *ex parte* off-the-record consultation between his staff and respondent as a "physical identification of material" (Pet. 19a) is directly contradicted

> (i) by respondent's own confession that the consultation resulted, *inter alia*, in a holding "that non-final manuscript opinions do not fall within the categories of 5 U.S.C. 552(a)(2)(B) and (C)" (R. Br. 3). There is no pretext in either of the district court's memorandum orders of January 10, 1974 (Pet. 3a) and March 11, 1974 (Pet. 16a) that *unbound* post-1967 manuscript decisions were "physically inspected". The acknowledgement that the district court, in the January 10 memorandum order, ruled upon how their content should be categorized is hence an *a fortiori* admission that the *ex parte* off-the-record consultation involved *far more* than "identification of material" and included *at least* advocate's arguments and representations as to

how this and other controverted matters should be dealt with by the district judge.[5]

(ii) respondent's non-too-subtle acknowledgement that even though it *failed* to "counter petitioner's 'statement of material facts as to which there is no genuine issue'" (R. Br. 4) *on the record*, "it would have been exalting form above substance [for the district court] to accept that statement of facts as dispositive on the record as it stood" (R. Br. 4). The implication is that since the government neglected to respond to or counter petitioner's statement, the district court's own off-the-record, *ex parte* excursion to investigate the material facts so as to afford a basis for disposing of the unopposed motion *adversely* to petitioner was not only understandable but justified.

Even if it *were* accurate, moreover, the characterization could not exculpate the district court's impropriety. The Code of Judicial Conduct contains no exception for judges who function as material witnesses in the "physical identification of materials." The attempted exculpation *ignores* the *ex parte* consultation and discussion accompanying the alleged "inspection", details of which have been carefully suppressed by respondent and the district court but which obviously strongly influenced the rulings.

The incorrect representation that "any facts . . . determined as a result of . . . [the ex parte off-the-record consultation between respondent and the district court's employee] were fully supported by the record in this case,

[5] The district court's own March 11, 1974 memorandum-order itself confesses that the purpose of the *ex parte*, off-the-record consultation was "to gain a better perspective on the materials actually in issue" (Pet. 17a) thereby admitting that far more than "physical inspection" was at stake.

or were undisputed and available, upon request, to any member of the public, or were found in petitioner's favor" (R. Br. 3) was first made by respondent in opposition to petitioner's motion in the district court to vacate the January 10, 1974 memorandum order, to recuse the district judge and to reopen proceedings for a full and fair hearing before a different judge.[6] Plaintiff's reply memorandum in the district court filed March 11, 1974 took issue with this representation as *"not true"*[7] and presented specific reasons detailing its inaccuracy.[8] Respondent's effort *now* to defend the district judge's conduct "as in no way improper" (R. Br. 3) is strikingly at odds with respondent's own interrogatory answer reproduced in the March 11, 1974 memorandum order (Pet. 19a) which denominated even the suggestion that respondent might have consulted *ex parte* with the district judge or his staff as one "which impugns the integrity of both the Court and counsel."[9]

(2) Respondent has not mentioned the fact, though it should have done so, that subsequent to the November

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[6] See the Appendix in No. 74-1365, copy of which has been lodged with the Clerk, at 207 where the same misrepresentation by respondent appears.

[7] Id at 212.

[8] Id at 212-217.

[9] Respondent's belated suggestion in this Court that "other Patent Office officials" than its sole affiant Martin could have been examined on Martin's affidavit again confesses the essential unfairness of the proceeding below. Even after Martin's first affidavit was clearly shown to be false (Pet. 8-9) that affidavit was not withdrawn but was instead supplemented by a second affidavit of Martin which did not even trouble to correct or explain the first (Pet. 9). No other "official" was offered or suggested as a substitute witness at any time.

Even more importantly, no authority cited by respondent or known to petitioner condones the proposition that the government may select as its affidavit witness on controverted matters one of its own lawyers and then immunize him from cross-examination because he is counsel.

20, 1974 filing of the petition in this case, on December 5, 1974, the President signed into law a statute amending 28 USC 455 having as its purpose "to broaden and clarify the grounds for judicial disqualification" [10] and incorporating therein the substance of Judicial Canons 2 and 3.

Under 28 USC 455 as thereby amended, a judge with "personal knowledge of disputed evidentiary facts" (Subsection (b)(1, p. 2a, *infra*) *must* in future cases disqualify himself (See subsection (e), p. 4a, *infra*).[11] If the decision below is allowed to stand, it will sufficiently blunt the force of the statutory language to provide the unscrupulous with an exception from the statute's mandate for instances when "physical identification of material" is allegedly at stake and will allow those relatively few judges who are bent on staying just at the line between ethical and unethical judicial conduct a basis for drawing that line at a different point from what the statute intends.[12]

(3) This Court's decision in *Goss* v. *Lopez*, No. 73-898, rendered January 22, 1975 affords a further reason for

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[10] See pp. 1a to 4a, *infra*, wherein the statute as adopted is reproduced.

[11] Note that section 3 of the statute (*infra*, p. 4a) specifically excludes cases pending at its enactment from its reach.

[12] Compare the Second Circuit's observation in *General Motors Corp.* v. *City of New York*, 501 F.2d 639, 649, decided June 28, 1974, that

> ". . . the Code of Professional Responsibility is not designed for Holmes' proverbial 'bad man' who wants to know just how many corners he may cut, how close to the line he may play, without running into trouble with the law. Holmes, *The Path of the Law*, in Collected Legal Papers 170 (1920). . . ."

It is timely for the lower federal judiciary to be made aware that the Code of Judicial Conduct and its statutory embodiment for future cases in amended 28 U.S.C. 455 are similarly *not* so designed.

the grant of review in this case. The lower courts should be clearly informed that *bona fide* litigants attempting to avail themselves of rights guaranteed by the Freedom of Information Act are at least equally entitled to due process and a fair hearing with public school students suspended for periods of up to ten days because of minor disciplinary infractions.

Respectfully submitted,

MARY HELEN SEARS
1801 K Street, N.W.
Washington, D.C. 20006
296-8855

Attorney for Petitioner

February 3, 1975

APPENDIX

APPENDIX

Union Calendar No. 697

93D CONGRESS
2D SESSION

S. 1064

[Report No. 93-1453]

IN THE HOUSE OF REPRESENTATIVES

OCTOBER 9, 1973

Referred to the Committee on the Judiciary

OCTOBER 9, 1974

Reported with amendments, committed to the Committee of the Whole House on the State of the Union, and ordered to be printed

[Omit the part in brackets and insert the part printed in italic]

AN ACT

To improve judicial machinery by amending title 28, United States Code, to broaden and clarify the grounds for judicial disqualification.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 455 of title 28, United States Code, is amended to read as follows:

"§ 455. [Disqualification of justice or judge] *Disqualification of justice, judge, magistrate, or referee in bankruptcy*

"(a) Any justice, judge, [or] magistrate, *or referee in bankruptcy* of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

"(b) He shall also disqualify himself in the following circumstances:

"(1) where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

"(2) where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

"(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

"(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

"(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

"(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

"(ii) Is acting as a lawyer in the proceeding;

"(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

"(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

"(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

"(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

"(1) 'proceeding' includes pretrial, trial, appellate review, or other stages of litigation;

"(2) the degree of relationship is calculated according to the civil law system;

"(3) 'fiduciary' includes such relationships as executor, administrator, trustee, and guardian;

"(4) 'financial interest' means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

"(i) Ownership in a mutual or common investment fund that holds securities is not a 'financial interest' in such securities unless the judge participates in the management of the fund;

"(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a 'financial interest' in securities held by the organization;

"(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a 'financial interest' in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

"(iv) Ownership of government securities is a 'financial interest' in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

"(e) No justice, judge, [or] magistrate, or *referee in bankruptcy* shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification."

SEC. 2. Item 455 in the analysis of chapter 21 of such title 28 is amended to read as follows: ["Disqualification of justice or judge."] *"Disqualification of justice, judge, magistrate, or referee in bankruptcy."*

SEC. 3. This Act shall not apply to the trial of any proceeding commenced prior to the date of this Act, nor to appellate review of any proceeding which was fully submitted to the reviewing court prior to the date of this Act.

Passed the Senate October 4, 1973.

Attest:

FRANCIS R. VALEO,
Secretary.